# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 3, 2013 |
| v | No. 303106<br>Wayne Circuit Court |
| WILLIAM THEARTIST PERKINS,<br><br>Defendant-Appellant. | LC No. 10-001225-FH |

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of conducting a criminal enterprise, MCL 750.159i(1), conspiracy to commit false pretenses involving a value of $20,000 or more, MCL 750.157a, and three counts of false pretenses involving a value of $20,000 or more, MCL 750.218(5)(a). Defendant was tried jointly with codefendant Michael Morris, who was convicted of the same offenses. The trial court sentenced defendant to concurrent prison terms of 50 months to 20 years for the criminal enterprise conviction and 4 to 10 years each for the conspiracy and false pretenses convictions. Defendant appeals as of right and for the reasons set forth in this opinion, we affirm.

Defendant's convictions arise from evidence that he and codefendant Morris were involved in a scheme to supply kiosks to churches in the Detroit area through an entity known as Television Broadcasting Online ("TVBO"), during which church officials were led to believe that the kiosks would be provided at no cost to the churches and that all costs would be assumed by national sponsors. The prosecution presented evidence that, contrary to what was represented, leasing companies would purchase the kiosks from TVBO and acquire four-year lease agreements to take on the role of lessor and collect lease payments from the churches. TVBO provided funds for the initial lease payments under the guise that the funds were provided by sponsors, but thereafter stopped making payments, leaving the churches liable for the remaining lease payments. After TVBO stopped providing funds for the churches to make lease payments, several lawsuits were filed. One lawsuit was filed by 20 churches against defendant, codefendant Morris, TVBO, and other entities, which led to the entry of a default judgment against defendant. The judgment awarded money damages to the civil plaintiffs and voided the lease agreements on the basis of fraud.

On appeal, defendant argues that the trial court erred in admitting evidence of the default judgment entered against him in the civil lawsuit. Defendant argues that his failure to respond to the lawsuit was not admissible under either MRE 801(d)(2)(A) or (B), and that to the extent the evidence was admissible under one of these rules, it should have been excluded under MRE 403. He also argues that his failure to respond to the lawsuit constituted pretrial silence protected by the Fifth Amendment privilege against self-incrimination.

We review a trial court's evidentiary decision for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217. Preliminary questions of law, including whether a rule of evidence precludes admission of proposed evidence, are reviewed de novo. *Burns*, 494 Mich at 110. Questions of constitutional law are also reviewed de novo. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

We first address defendant's constitutional challenge to the admissibility of the default judgment. Although plaintiff questions whether this issue was preserved for appeal, because the trial prosecutor raised the issue whether the Fifth Amendment precluded admissibility of the default judgment, defendant and codefendant Morris both disputed this claim in their joint response to the prosecutor's motion in limine, and the trial court adopted the prosecutor's position when allowing the evidence, we conclude that this issue is preserved.

The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself[.]" US Const, Am V. In essence, it prohibits the use of a defendant's failure to take the stand as substantive evidence of guilt. *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013). Pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the defendant's privilege against compelled self-incrimination during custodial police interrogation is further protected by the requirement that a defendant be warned of his right to remain silent and that any statement he makes may be used as evidence against him. *Clary*, 494 Mich at 265. Where a defendant has not received *Miranda* warnings and there is no reason to conclude that the defendant's silence is attributed to the invocation of the Fifth Amendment privilege, no constitutional difficulties arise from the use of a defendant silence before or after his arrest, as substantive evidence of guilt. *People v Solmonson*, 261 Mich App 657, 665; 683W2d 761 (2004); *People v Schollaert*, 194 Mich App 158, 165-166; 486 NW2d 312 (1992). Here, defendant did not claim, and there is nothing in the record to indicate, that defendant's failure to respond to the civil lawsuit was attributable to an invocation of the Fifth Amendment privilege against self-incrimination or reliance on *Miranda* warnings.

Although defendant urges this Court to find a constitutional violation based on the reasoning in *Combs v Coyle*, 205 F3d 269, 283 (CA 6, 2000), this Court is not bound to follow decisions of federal circuit courts on questions of federal law. *Abela v Gen Motors Crop*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Moreover, we note that federal circuit courts of appeals are divided on whether the prosecution's use of a defendant's pre-*Miranda* silence in its case-in-chief violates the Fifth Amendment. See *People v Shafier*, 483 Mich 205, 213 n 8; 768 NW2d 305 (2009). Instead, under MCR 7.215(J)(2), we must follow the rule of law set forth in *Schollaert* and *Solmonson* and, accordingly, reject defendant's claim of constitutional error.

Defendant also argues that the default judgment was not admissible as a tacit admission under the general principles set forth in *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). However, the record discloses that the prosecutor did not offer the default judgment as a tacit admission, but rather as a statement of a party-opponent under MRE 801(d)(2)(A), and the trial court admitted the evidence for that purpose. Thus, we turn our analysis to MRE 801(d)(2)(A).

MRE 801(d)(2)(A) provides that a statement offered against a party is not hearsay if it is "the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles." When construing an evidentiary rule, a court applies the same rules applicable to the construction of a statute. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). Thus, we look to the plain language of MRE 801(d)(2)(A) to determine its meaning. *Duncan*, 494 Mich at 723.

MRE 801(d)(2)(A) plainly requires that the evidence in question be "the party's own statement[.]" MRE 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." An assertion must be capable of being true or false. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998), mod 458 Mich 862 (1998).

The only basis offered by the prosecution for establishing an assertion was MCR 2.111(E), which addresses the effect of a failure to deny allegations in a pleading. MCR 2.111(E)(1) provides that "[a]llegations in a pleading that requires a responsive pleading, other than allegations of the amount of damages or the nature of the relief demanded, are admitted if not denied in the responsive pleading." The general rule apart from MCR 2.111(E) is that a default judgment settles liability questions as to all well-pleaded allegations in a complaint. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000). Stated otherwise, "[e]ntry of a default is *equivalent* to an admission by the defaulting party as to all well-pleaded allegations." *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512; 303 NW2d 234 (1981) (emphasis added). Because the inquiry under MRE 801(d)(2)(A) is not whether there is some type of equivalence to an admission, but rather whether nonverbal conduct was intended as an assertion, we conclude that the trial court erred in accepting the prosecution's offer of proof. The mere entry of a default judgment, even when considered in light of MCR 2.111(E), is insufficient to establish an intended assertion. Accordingly, the trial court erred in admitting the default judgment. However, we also conclude that the error was harmless.

Whether a nonconstitutional evidentiary error requires reversal is evaluated by considering the weight and strength of the untainted evidence to determine if it is more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Reversal is not warranted unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Burns*, 494 Mich at 110; *Lukity*, 460 Mich at 495-496.

In this case, contrary to what defendant argues, the record does not indicate that the prosecutor continued to hammer to the jury that the default judgment constituted substantive evidence of his guilt. The prosecutor's remarks in opening statement regarding the "don't care" attitude of defendant and codefendant Morris toward the default judgment is more consistent

with a consciousness of guilt rather than evidence of admissions to allegations in the civil action. See *Solmonson*, 261 Mich App at 666-667 (nonresponsive conduct may constitute consciousness of guilt). Further, examining the prosecutor's remarks in their entirety, it is apparent that the prosecutor was not asking the jury to find defendant guilty on the basis of the default judgment, but rather the testimony of the many witnesses involved in the lease transactions. The prosecutor continued this approach in his closing argument, although the prosecutor made brief references to the amount of loss determined in the default judgment.

Regardless, the jury heard testimony regarding several civil actions that arose from the lease transactions, including testimony by Pastor Roy Hill regarding a default judgment obtained by United Leasing against his church. The jury also heard testimony by codefendant Morris regarding the financial difficulties that he and defendant were experiencing at the time of the civil action, which he explained was the reason he did not defend the civil action. Further, the jury's decision to the acquit both defendant and codefendant Morris of one of the false pretenses charges and all four charges of fraudulently obtaining a signature to a financial document under MCL 750.273, despite the information in the order settling damages in the civil action that financing leases were voided on the basis of fraud, belies any suggestion that the default judgment influenced the jury's verdict.

We also are not persuaded by defendant's argument that there is a real likelihood that the jury used the default judgment to discredit testimony provided by codefendant Morris and other witnesses regarding a potential investor, Jesus Linares, reneging on a financial commitment to the Diversity Financial Services Network (DFN). Further, defendant has not established anything about DFN or any funding relating to that project that was determinative of the charges that he and codefendant Morris were engaged in a scheme to obtain lease agreements for kiosks from churches by making false representations regarding the existence of national sponsors to pay for the entire four-year leases. Codefendant Morris's testimony indicated that DFN, while intended as an umbrella organization that would obtain other businesses to offer financial services, was not even a licensed and functioning entity when representations were made to the churches regarding the existence of national sponsors. In contrast to the testimony of multiple prosecution witnesses, codefendant Morris also testified that the obligation to provide funds to churches to make lease payments was for only one year.

Considering the untainted evidence as a whole, the acquittal on five charges, and the prosecutor's limited comments and arguments regarding the default judgment, it does not affirmatively appear to this Court more probable than not that evidence of the default judgment was outcome determinative. Therefore, we conclude that the trial court's error in admitting the default judgment was harmless. *Burns*, 494 Mich at 110; *Lukity*, 460 Mich at 495-496.

Defendant also argues that the judgment of sentence should be amended to reflect the trial court's post-sentencing ruling regarding restitution. After defendant filed his brief on appeal, the trial court entered a stipulated order of restitution granting defendant the relief he requests in this issue. Accordingly, this issue is moot. *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009) (where a defendant has already received the relief he requests, the issue is moot).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello